4770

No. 05-1256

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PHILIP MORRIS U.S.A.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICUS CURIAE* STEVEN L. CHANENSON AND JOHN Y. GOTANDA IN SUPPORT OF PETITIONER

ROBERT D. FOX *
JOHN F. GULLACE
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE MAXIMUM COMPARABLE MONETARY CRIMINAL OR CIVIL PENALTIES SHOULD PROVIDE THE "PRESUMPTIVE LIMIT" FOR A PUNITIVE DAMAGES AWARD	3
A. The "Presumptive Limit" Approach To The Third Guidepost Produces A Workable Test That Furthers Constitutional Goals	5
B. Monetary Criminal And Civil Penalties Provide Meaningful Notice Of The Size Of Punitive Damages Awards Defendants May Face	6
C. Looking To Criminal And Civil Monetary Penalties As A Limit For Punitive Damages Provides Appropriate Deference To Legislative Decisions	8
D. Setting The Third Guidepost As A Presumptive Limit On Punitive Damages Awards Would Simplify The Analysis And Create More Uniform Decisions While Still Retaining Flexibility	9

TABLE OF CONTENTS—Continued

Page

II. COMPARING PUNITIVE DAMAGES AWARDS TO NON-MONETARY CRIMINAL PUNISHMENTS IS FUNDAMENTALLY FLAWED 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES Page

Aldworth Co. v. England, 622 S.E.2d 367 (Ga. Ct. App. 2005), *cert. granted by Ga. S. Ct.*, http://www.gasupreme.us/granted_certs/GC_06.html#s06c0310 13
BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*
Borne v. Haverhill Golf & Country Club, Inc., 791 N.E.2d 903 (Mass. App. Ct. 2003) 4
Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc. 492 U.S. 257 (1991) 4
Community Bank, Ellisville, Miss. v. Courtney, 884 So.2d 767 (Miss. 2004) 12
Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 8
DiSorbo v. Hoy, 343 F.3d 172 (2d Cir. 2003) 12
In re the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004) ..... *passim*
Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) 7, 9
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 4, 6, 11
State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408 (2003) ..... *passim*
United States v. Big D Enters., Inc., 184 F.3d 924 (8th Cir. 1999) 10
Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006) ..... *passim*
Ziemba v. Armstrong, No. 3-98-cv-2344, 2006 WL 1405576 (D. Conn. May 17, 2006) 12

CONSTITUTION AND STATUTES

Or. Rev. Stat. § 161.625(1)(c) (2005) 12
Or. Rev. Stat. § 161.625(4) (2005) 12

TABLE OF AUTHORITIES—Continued

Page

Or. Rev. Stat. § 161.655(1)(a) (2005) 11, 12
Or. Rev. Stat. § 161.655(3) (2005) 11, 12

OTHER AUTHORITIES

American Bar Association, Criminal Justice Sentencing Standards (History of Standard) (3d ed. 1994) 9

Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. Mich. J.L. Reform 441(2004) ..... *passim*

Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 Or. L. Rev. 33 (2003) 8, 9

IN THE

Supreme Court of the United States

No. 05-1256

PHILIP MORRIS U.S.A.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICUS CURIAE* STEVEN L. CHANENSON AND JOHN Y. GOTANDA IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amici are law professors who have a professional interest in the proper application and development of the law of punitive damages. Steven L. Chanenson is an Associate Professor of Law at Villanova University School of Law, where he has written on punitive damages, sentencing and criminal procedure. John Y. Gotanda is the Associate Dean for Faculty Research, Professor of Law and Director of the J.D./M.B.A. Program at Villanova University School of Law, and has written widely on punitive damages in the domestic, comparative and international contexts.[1]

[1] Blanket letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any portion of

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court in *Gore* erected three guideposts—(1) the degree of the reprehensibility of the conduct, (2) the ratio between punitive and compensatory awards, and (3) the comparable penalties for similar conduct—to steer courts away from unconstitutionally excessive punitive damages awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *see also State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003). Properly understood, the third guidepost can clarify and significantly enhance this Court's efforts to regulate punitive damages awards. Courts should apply the third guidepost by concentrating on the highest comparable criminal or civil fines set by the legislature and view any such penalties as a "presumptive limit" on punitive damages awards. *See* Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. Mich. J.L. Reform 441, 444 (2004).

As (mis)interpreted by the Oregon Supreme Court, the third guidepost would largely be meaningless. The Oregon legislature set the monetary penalty for the comparable conduct far lower than the punitive award in this case. By ignoring that specific determination, the Oregon Supreme Court failed to follow this Court's general directive to defer to legislative judgments and to ensure that tortfeasors—even, perhaps especially, despised ones—have adequate notice of the magnitude of the punitive damages that may flow from their wrongful conduct. Furthermore, the Oregon Supreme Court failed to recognize that incarceration simply does not translate in any helpful way for evaluating a punitive dam-

---

this brief. Other than the research assistance of law students Hilleary Hoelzen, Jessica Khan and Michael Parello, which was provided by Villanova University School of Law, no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ages award and improperly relied on the existence of a potential incarcerative sentence for comparable conduct. If uncorrected, the decision below would undermine both *Gore* and *Campbell* by providing an inappropriate and easy detour around the purposes of this Court's guideposts.

To stop this subversion of the Court's intended Due Process review of punitive damages awards, *amici* propose a "presumptive limit" approach to the third guidepost. This approach would treat the maximum comparable monetary criminal or civil penalties as the "presumptive limit" for a punitive damages award. The "presumptive limit" approach is consistent with the goals of this Court's punitive damages jurisprudence as set forth in such cases as *Gore* and *Campbell*, satisfies the Due Process need for fair notice, recognizes that important lawmaking authority belongs in the hands of legislatures, and allows for greater proportionality and nuance while evaluating punitive damages awards. Importantly, it is easy to apply and should result in more uniform decisions while still retaining flexibility.

ARGUMENT

I. THE MAXIMUM COMPARABLE MONETARY CRIMINAL OR CIVIL PENALTIES SHOULD PROVIDE THE "PRESUMPTIVE LIMIT" FOR A PUNITIVE DAMAGES AWARD.

Amici urge this Court to adopt a "presumptive limit" approach to the third guidepost. Under this approach, the maximum comparable monetary criminal or civil penalties provide the "presumptive limit" for a punitive damages award. This concept produces a meaningful and workable test for the third guidepost that honors this Court's goals for a Due Process review of punitive damages awards.

The approach to the third guidepost currently taken by most lower courts fails to satisfy this Court's constitutional

objectives. In applying the Due Process Clause of the Fourteenth Amendment as a check against unconstitutionally excessive punitive damages awards, this Court vindicated important principles. For example, in *BMW of North America, Inc. v. Gore*, this Court stressed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the *severity* of the penalty that a State may impose." 517 U.S. at 574 (emphasis added). Furthermore, courts should afford ""'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."" *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

As Justice O'Connor noted in her dissent in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 63 (1991), "[t]he Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results." To that noble end, this Court adopted and then refined the three guideposts in *Gore* and *Campbell*. Unfortunately, the guideposts have not produced the kind of guidance the Court had hoped. *See* Chanenson & Gotanda, *supra*, at 466-77 (citing cases and commentary). As presently interpreted, many lower courts have had a particularly hard time applying the third guidepost. Indeed, some courts have completely ignored the third guidepost. *See, e.g., Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903 (Mass. App. Ct. 2003). The lower courts need help. They need a new approach.

A. The "Presumptive Limit" Approach To The Third Guidepost Produces A Workable Test That Furthers Constitutional Goals.

A proper interpretation of the third guidepost calls for courts to look to the maximum comparable criminal or civil monetary fines authorized by statute. The highest comparable fine should be the *presumptive limit* on the punitive damages award. If the punitive damages award provided by the jury is smaller than this presumptive limit, the third guidepost would present no bar to the imposition of the award. Of course, the punitive damages award must still survive judicial scrutiny pursuant to the first two guideposts before it would pass constitutional muster. Nevertheless, passing the third guidepost would often be suggestive of a constitutionally permissible punitive damages award.

If the punitive damages award is larger than the presumptive limit, the third guidepost would not be satisfied. Failing the third guidepost would be a strong indication, but not a guarantee, that the punitive damages award is unconstitutionally excessive. If the punitive damages award fails the third guidepost and has an unacceptably large ratio, the award would be unconstitutional in virtually all cases. If, however, the punitive damages award fails the third guidepost but has an acceptable ratio pursuant to the second guidepost, the court would concentrate on the first guidepost's inquiry into reprehensibility. In setting the statutory maximum fine that fixes the presumptive limit, the relevant legislature has spoken to the misconduct's reprehensibility already. Thus, it will be difficult, but not impossible, to conclude that the misconduct is so reprehensible as to justify a punitive damages award greater than the presumptive limit set by the legislature. Indeed, this conclusion is appropriate only in

cases of overwhelming reprehensibility in which the conduct falls outside all bounds of decency.[2]

This presumptive limit approach to the third guidepost is easy to apply, satisfies the Due Process need for notice, is respectful of federalism concerns, and allows for greater proportionality while evaluating punitive damages awards. *See* Chanenson & Gotanda, *supra*, at 478.

B. Monetary Criminal And Civil Penalties Provide Meaningful Notice Of The Size Of Punitive Damages Awards Defendants May Face.

Civil and criminal fines, which are analogous to punitive damages, can provide the appropriate kind of notice to support a punitive damages award. As one court stated, comparable penalties "are the very kind of thing that a reasonable person would think about if he were evaluating the possible consequences of his conduct." *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1090 (D. Alaska 2004). There, numerous plaintiffs sued Exxon for damages caused by the spill of 11 million gallons of oil in Prince William Sound. *Id.* at 1077-79. In reviewing and endorsing the $5 billion

---

[2] The Oregon Supreme Court is correct that there are dicta in *Campbell* that would seem to support a punitive damages award dramatically higher than the presumptive limit approach we propose. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1178 (Or. 2006) (citing and quoting *Campbell*, 538 U.S. at 428-29); *cf Haslip*, 499 U.S. at 23 (approving a punitive damages award greater than the comparable criminal fine before *Gore* and *Campbell*). Not only is such a view true *dicta*, *see Campbell*, 538 U.S. at 429 (stating that the conduct "likely would justify" a punitive damages award approximately 100 times the legislatively authorized sanction, but then holding that "[t]he proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts"), it ignores the fact the Court can now consider the experience of the three post-*Campbell* years during which time the third guidepost has continued to be unworkable and, in the mind of some lower courts, largely irrelevant.

award of punitive damages, the court looked to the maximum amount of criminal fines that Exxon could face for its conduct, which totaled $5.1 billion. *Id.* at 1107. To this sum, the court added possible civil fines. *Id.* at 1108-09.[3]

The presumptive limit approach does not pre-determine the outcome; it simply provides a clear, workable test that gives meaningful notice and defers to legislative prerogatives. For example, comparable criminal or civil penalties may support a high punitive damages award, as in *In re the Exxon Valdez*, or may lead a court to reduce a punitive damages award based on comparable penalties. *See Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). In *Lincoln*, where the jury found the defendant violated the Fair Housing Act, the court remitted a $100,000 punitive damages award to $55,000, the maximum civil penalty the defendant could face. *Id.* The court found that this amount was consistent with the requirement that ""a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty."" *Id.* (quoting *Campbell*, 538 U.S. at 417).

In this case, the maximum fine a corporation could face for manslaughter was $50,000.[4] *See Williams*, 127 P.3d at 1179. Thus, a punitive damages award of $79.5 million does not satisfy the presumptive limit approach to the third guidepost. This award also fails to provide Petitioner with adequate notice of the monetary punishment it might face in the form of punitive damages because of its wrongful conduct.

---

[3] While the court also noted that Exxon personnel could have faced prison sentences, *see In re the Exxon Valdez*, 296 F. Supp. 2d at 1108, this factor does not seem crucial because the civil and criminal monetary penalties already exceeded the amount of punitive damages. Despite its conclusion that the $5.1 billion award passed constitutional muster, the district court followed the Ninth Circuit's instruction and reduced the punitive damages award to $4.5 billion.

[4] In light of the Oregon Supreme Court's opinion, we assume, arguendo, that manslaughter is the appropriate analog. *See also infra* note 6.

C. Looking To Criminal And Civil Monetary Penalties As A Limit For Punitive Damages Provides Appropriate Deference To Legislative Decisions.

Using statutory maximum fines as a presumptive limit on punitive damages is also in line with the basic tenets of federalism, moving law-making decisions from judges and juries back to the legislature. *Cf. Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-33 (2001). Indeed, this is one of the reasons why the presumptive limit approach can be so helpful in ensuring constitutional punitive damages awards. *See* Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 Or. L. Rev. 33, 50 (2003) (stating the third guidepost "is the only one of the *Gore* Court's three criteria that ties the punitive damages verdict to broader policy judgments made by 'society,' as expressed through the legislature, as to what the appropriate punishment for the behavior at issue should be").

A state legislature should be free to choose how to pursue its interest in meting out punishment and achieving deterrence within its jurisdiction. This works to prevent arbitrary punitive damages awards that serve no legitimate state purpose. Finally, this approach allows state legislatures to take a more sophisticated approach. As such, they can achieve greater proportionality in punitive damages awards by addressing particular types of misconduct rather than depending on flat caps or multiplier caps that apply to all forms of misconduct

to control the award of punitive damages. *See* Chanenson & Gotanda, *supra*, at 486-87.

As noted above, the presumptive limit approach need not lead to small punitive damages awards. Legislatures may authorize, and some in fact have established, massive monetary penalties for certain conduct. *See, e.g., In re the Exxon Valdez*, 296 F. Supp. 2d at 1107-08 (comparing $5 billion punitive damages award to $5.1 billion criminal fine that defendant could face). If the Oregon legislature decides that $50,000 is too small a penalty for "extraordinarily reprehensible," *Williams*, 127 P.3d at 1181, conduct such as Petitioner's, it can amend its laws.[5] Until the legislature does so, however, courts should respect its judgment as to the appropriate monetary sanction. *See, e.g.*, Chanenson and Gotanda, *supra*, at 488-91 (discussing the impact of unusually low, unusually high or nonexistent legislatively set monetary punishments); Schwartz et al., *supra*, at 53-54 (discussing impact of low or nonexistent fines).

D. Setting The Third Guidepost As A Presumptive Limit On Punitive Damages Awards Would Simplify The Analysis And Create More Uniform Decisions While Still Retaining Flexibility.

Using a statutory maximum fine as a presumptive limit on punitive damages awards offers lower courts a simple and objective frame of reference. *See, e.g., Lincoln*, 340 F.3d at 294 (reducing punitive damages award to the maximum civil fine for comparable conduct and stating "a punitive damages award coextensive with the statutory maximum civil penalty

---

[5] One potential salutary byproduct of adopting the presumptive limit approach may be to encourage criminal sentencing reform that takes non-incarcerative punishment more seriously. The American Bar Association has been encouraging just such a move for more than a decade. *See* American Bar Association, Criminal Justice Sentencing Standards 18-3.16 (History of Standard) (3d ed. 1994).

is reasonable and proportionate to the wrong committed"); *United States v. Big D Enters., Inc.*, 184 F.3d 924, 933-34 (8th Cir. 1999) (approving damages of $50,000 against each defendant because, among other things, the award did not exceed the maximum civil penalty permitted); *cf. In re the Exxon Valdez*, 296 F. Supp. 2d at 1107-10 (noting potential criminal liability could have amounted to $5.1 billion and thus court was "well satisfied that Exxon was fairly on notice that . . . the company could face in excess of $5 billion in criminal and civil penalties for recklessly spilling crude oil into Prince William Sound" and thus "a $5 billion [punitive damages] award was justified and is not grossly excessive so as to deprive Exxon of fair notice—its right to due process").

A presumptive limit approach to the third guidepost does not require judges to turn to subjective beliefs. Given this common starting point, courts are more likely to treat roughly comparable punitive damages awards, based on roughly comparable conduct within a particular jurisdiction, in a roughly more uniform fashion. This approach brings much needed structure to the excessiveness evaluation, providing guidance that lends itself to a more meaningful and principled evaluation of punitive damages awards. Yet not only does the court still have the flexibility of the first two guideposts, but the presumptive nature of this test permits some play in the joints for the unusual circumstance.

II. COMPARING PUNITIVE DAMAGES AWARDS TO NON-MONETARY CRIMINAL PUNISHMENTS IS FUNDAMENTALLY FLAWED.

The Oregon Supreme Court erred by relying on the potential sanction of incarceration for the conduct at issue to justify the size of the punitive damages award. *See Williams*, 127 P.3d at 1179-80. This approach could lead to the near-total evisceration of the third guidepost. The possibility of incarceration fails to provide constitutionally meaningful notice of

punitive damages. Furthermore, incarceration and monetary fines are largely incommensurable. Only the maximum criminal or civil monetary sanctions provide a useful and appropriate frame of reference for evaluating the third guidepost.

While *Gore* indicated that criminal sanctions generally, which may include incarceration as well as fines, are relevant in considering the third guidepost, *see Gore*, 517 U.S. at 583 (citing *Haslip*, 499 U.S. at 23), this Court has never fully explored the role of incarceration and has, logically, spent more energy discussing comparable monetary penalties. At most, possible incarceration may be a general indication of the seriousness with which the state legislature views a crime. However, this broad consideration is also part of the first *Gore* guidepost, the reprehensibility of the defendant's behavior. *See, e.g., Gore*, 517 U.S. at 575-76. The third guidepost can and should mean more.

In this case, the Oregon Supreme Court stated that "the possibility of severe criminal sanctions . . . put [Petitioner] on notice that Oregon would take such conduct very seriously." *Williams*, 127 P.3d at 1179. This Court's Due Process analysis is not satisfied by such a crude test in which the mere potential of an incarcerative criminal sanction is apparently sufficient to authorize limitless punitive damages.[6] That a

---

[6] In the case at bar, the petitioner's corporate status provides an additional complication concerning the relevance of incarceration as a criminal punishment. Obviously, prison sentences do not apply to corporations. *See In re the Exxon Valdez*, 296 F. Supp. 2d at 1108 (recognizing "it is not possible to imprison a corporate defendant in a criminal case"). The only comparable criminal sanction that would have applied to the petitioner was a criminal fine of up to $50,000 or a sum "not exceeding double the amount of the corporation's gain from the commission of the offense." Or. Rev. Stat. §§ 161.655(1)(a), 161.655(3) (2005). While there is no indication in the Oregon Supreme Court opinion that respondent presented evidence concerning the latter, it is likely that the petitioner's gain from the alleged felony against Jesse Williams, even when doubled, would not have come close to the $79.5 million punitive

state takes certain conduct "very seriously" is a general indication of offense severity, but it does not indicate the *amount* of punitive damages a corporation could face for engaging in such conduct. *See DiSorbo v. Hoy*, 343 F.3d 172, 187-88 (2d Cir. 2003) (holding that even though defendant could face prison, he was not on notice that he could face $1.275 million in punitive damages given that maximum fine for his conduct was $1,000).

Indeed, incarceration is not meaningfully comparable to punitive damages. For example, there is the practical problem of comparing the potential *length* of a prison sentence to the *amount* of a punitive damages award. For purposes of the third guidepost, a prison sentence cannot be helpfully compared to a monetary figure because nontrivial deprivations of liberty will almost always be a more severe penalty than deprivations of money. *See* Chanenson & Gotanda, *supra*, at 479-80; *see also Community Bank, Ellisville, Miss. v. Courtney*, 884 So.2d 767, 787 (Miss. 2004) (Easley, J. dissenting) (stating that "imprisonment is a loss of freedom and arguably by most standards a more valuable possession than punitive damage awards"). The difficulty of translating prison sentences into punitive damages awards is apparent in courts' different conclusions on the subject. *Compare Ziemba v. Armstrong*, No. 3-98-cv-2344, 2006 WL 1405576, at *7 (D. Conn. May 17, 2006) (stating that "one year of imprisonment may well be equivalent to a financial loss of $150,000"), *with*

---

damages award. *See id.*; Or. Rev. Stat. §161.625(4) (2005) (stating that the defendant's gain for purposes of section 161.655(3) "means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authorities before the time sentence is imposed"). The maximum monetary fine for an individual was $250,000. Or. Rev. Stat. §161.625(1)(c) (2005). The Court need not determine which fine amount presents the presumptive limit for purposes of the third guidepost because the punitive damages award is dramatically higher regardless.

Aldworth Co. v. England, 622 S.E.2d 367, 373 (Ga. Ct. App. 2005) (reasoning that because of a possible one-year prison sentence, "we cannot say that the jury went too far when it decided to punish [the defendant] to the extent of $1 million in punitive damages"), *cert. granted by Ga. S. Ct.*, http://www.gasupreme.us/granted_certs/GC_06.html#s06c0310 (appealing other issues).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

ROBERT D. FOX *
JOHN F. GULLACE
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

* Counsel of Record

Counsel for Amicus Curiae

July 27, 2006